Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 September 2018 [1]

Case C-552/17

Alpenchalets Resorts GmbH
v
Finanzamt München Abteilung Körperschaften

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling — Value added tax (VAT) — Special VAT scheme for travel agents — Scope — Provision of holiday accommodation — Other services provided — Ancillary and principal services — Reduced rate of tax — Applicability to accommodation supplied by a travel agent)

I. Introduction

1. Alpenchalets Resorts GmbH rents houses from their owners and then lets them for holiday purposes to its customers. On arrival, the owners or their agents provide further services to the individual customers, such as cleaning of the accommodation and, in some cases, a laundry and 'bread roll' service.

2. Does this qualify as a 'service provided by a travel agent' for the purposes of Directive 2006/112/EC [2] ('the VAT Directive')? That issue is currently pending before the Bundesfinanzhof (Federal Finance Court, Germany), which wishes to know whether the service in question can be classified as a service provided by a travel agent, and if it can, whether the reduced rate of taxation should apply on the taxable amount (the margin) regarding the accommodation component of the service provided.

3. The present preliminary reference invites the Court to be specific with regard to what constitutes a 'service provided by a travel agent', considering that a travel agent's supply typically consists of multiple services (such as accommodation and transport). It also invites the Court to examine the interplay between two specific value added tax (VAT) regimes, one concerning the taxable amount (margin), and the other, the reduced rate of VAT.

1 Original language: English.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

II. Legal framework

A. EU law

4. Under Article 98(1) of the VAT Directive, which is part of Title VIII entitled 'Rates', Member States may apply either one or two reduced rates. Pursuant to the first subparagraph of Article 98(2), the reduced rates are to apply only to supplies of goods or services in the categories set out in Annex III to the VAT Directive.

5. Point (12) of Annex III to the VAT Directive reads as follows:

'accommodation provided in hotels and similar establishments, including the provision of holiday accommodation and the letting of places on camping or caravan sites.'

6. Article 306 of the VAT Directive is part of Title XII entitled 'Special schemes' and, within that title, of Chapter 3 — 'Special scheme for travel agents'. Article 306(1) of the VAT Directive provides as follows:

'Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.'

7. Article 307 of the VAT Directive states:

'Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller.

The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.'

8. Article 308 of the VAT Directive provides:

'The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.'

B. National Law

9. Under Paragraph 12(2)(11) of the Umsatzsteuergesetz (Law on Turnover Tax, 'the UStG') the tax is to be reduced to 7% for the following transactions:

'the letting of living and sleeping rooms which a trader keeps available for the short-term accommodation of guests, as well as the short-term letting of camping areas. The first sentence shall not apply to the supply of services which are not directly used for the letting, even if such services are covered by the rental charge.'

10. Paragraph 25(1) of the UStG lays down the following requirements for the taxation of travel services:

'The following provisions shall apply to travel services supplied by a trader that are not intended for the purposes of the customer's business, where the trader deals with customers in his own name and makes use of travel-related inputs. The service supplied by the trader is deemed to fall within the category of other services. If the trader provides several services of this nature to a customer in the context of one journey, those services will be deemed to be the supply of a single service falling within the other services category. The place at which the other service is provided shall be determined in accordance with Paragraph 3a(1). Travel-related inputs are supplies and other services provided by third parties which are for the direct benefit of the traveller.'

11. Paragraph 25(3) of the UStG provides:

'The taxable value of other services shall be the difference between the amount paid by the customer for the service and the amount paid by the trader for travel-related inputs. Value added tax shall not form part of the taxable amount. Instead of calculating the taxable amount for each individual service supplied, the trader may calculate it either for groups of services or for all the services provided within the taxation period.'

III. Facts, procedure and the questions referred

12. In 2011, Alpenchalets Resorts ('the Applicant') rented houses in Germany, Austria, and Italy from their owners, and subsequently let them, in its own name, to individual customers for holiday purposes. In addition to the provision of accommodation, the respective houseowners or their agents provided services to customers on their arrival at the location in question, including cleaning of the accommodation and, in some cases, a laundry and a 'bread roll' service.

13. The Applicant calculated the VAT it owed according to the 'taxation of margins', which is applicable to travel services under Paragraph 25 of the UStG and applied the standard tax rate. By letter of 6 May 2013, the Applicant requested an amendment of the tax assessment and application of the reduced tax rate. The Finanzamt München Abteilung Körperschaften (Munich Tax Office, Corporations Department, Germany) ('the Defendant', and respondent on a point of law) refused that request.

14. The Finanzgericht (Finance Court, Germany) (the 'first-instance court') rejected the action brought by the Applicant. It held that the 'taxation of margins' rule was applicable to the travel services at issue in accordance with Paragraph 25 of the UStG, interpreted in the light of the case-law of the Court concerning Article 26 of Sixth Council Directive 77/388/EEC[3] ('the Sixth Directive') and the VAT Directive. It also held that the application of the reduced rate of taxation was not possible because the supply of a travel service under Paragraph 25 of the UStG was not included in the list of tax rate reductions set out in Paragraph 12(2) of the UStG.

15. The Applicant appealed on a point of law against that ruling to the Bundesfinanzhof (Federal Finance Court), the referring court. That court notes that in the judgment in *Van Ginkel*,[4] the Court confirmed the applicability of the special scheme for travel agents to a travel agent which only provided accommodation. That was because the travel agent may also provide other services to its customers — such as information and advice. While acknowledging that that solution has been confirmed in the

3 Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

4 Judgment of 12 November 1992 (C-163/91, EU:C:1992:435).

subsequent case-law,[5] the referring court wonders whether such an approach should not be reconsidered in the light of the distinction between *principal* and *ancillary* services provided, referring specifically to the *Ludwig* judgment[6] in this regard. If such a differentiation is, however, not called for, the referring court wishes to ascertain whether the application of a reduced rate of VAT on the taxable amount (*in casu*, the margin under the special scheme for travel agents) can be granted.

16. The referring court explains that if the first question is answered in the negative, namely if it appears that the service at issue does not fall under the special scheme for travel agents, the Applicant must tax (in Germany) only the letting of holiday accommodation situated in Germany, but not the letting of holiday accommodation located elsewhere. The letting of holiday accommodation that is situated in Germany would, in addition, be subject to the reduced tax rate, and the Applicant would be entitled to deduct the related input tax.

17. In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and refer the following questions to the Court:

'(1) Is the supply of a service which consists essentially in the provision of holiday accommodation and in which additional service components are to be regarded merely as ancillary to the principal supply, in accordance with the judgment of the Court of Justice of the European Union of 12 November 1992, *Van Ginkel* (C-163/91, EU:C:1992:435), subject to the special scheme for travel agents under Article 306 of [Directive 2006/112]?

(2) If the first question is answered in the affirmative, can that supply of service also be subject, in addition to the special scheme for travel agents under Article 306 of [Directive 2006/112], to the tax rate reduction for the provision of holiday accommodation, as referred to in Article 98(2) of [Directive 2006/112] in conjunction with Annex III, point (12)?'

18. Written submissions were lodged by the German and Netherlands Governments as well as by the European Commission. The Applicant, the German Government, and the Commission presented oral argument at a hearing that took place on 11 July 2018.

IV. Assessment

19. This Opinion is structured as follows. In Part A, addressing the first question of the referring court, I will examine whether a supply must be composed of more than one service for it to be covered by the special scheme for travel agents. In Part B, in response to the second question of the referring court, I suggest that a reduced rate of taxation cannot apply to a service when it is classified as a 'service supplied by a travel agent'.

A. First question: 'service supplied by a travel agent'

20. After some introductory remarks on the special scheme for travel agents (1), I will examine whether there is a requirement of multiplicity of services within a single supply provided by the travel agent. Two alternatives will be contemplated: first, if that multiplicity is indeed required (2); and, second, the alternative understanding of the special scheme for travel agents as requiring only one 'bought-in' supply (from a third party) relating either to accommodation or to transport for that special scheme to apply (3). The discussion of the logical consequences (or lack thereof) of both approaches leads me to suggest that the 'one bought-in service only' approach is to be preferred (4).

5 Judgment of 9 December 2010, *Minerva Kulturreisen* (C-31/10, EU:C:2010:762, paragraph 21 et seq.), and order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120).

6 Judgment of 21 June 2007 (C-453/05, EU:C:2007:369, paragraph 19).

1. Introduction: who is a travel agent?

21. Article 306(1), first subparagraph, of the VAT Directive specifies that the special scheme for travel agents applies to 'transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities'. At the same time, the second subparagraph of the same provision excludes from that scheme 'travel agents where they act solely as intermediaries …'.

22. Those provisions thus appear to contain, prima facie, two positive conditions: (i) to be acting in its own name; and (ii) to be using the supplies of third parties; and one negative condition: (iii) not to be acting as an intermediary. However, on a closer inspection, the third condition appears rather to represent a negative restatement of the first one: 'acting in its own name' does not appear to be much different from 'not to be acting as an intermediary'.[7]

23. There thus appears to be, in reality, two conditions for the special scheme for travel agents to apply under Article 306 of the VAT Directive. The first requires the trader to act in its own name and not as an intermediary. The second requires the trader to use third parties' supplies.

24. As regards the *first* condition, there seems to be agreement that the Applicant is acting in its own name and not as an intermediary, as also clearly confirmed by the order for reference. I shall therefore take that as a given.

25. Whether the *second* condition is satisfied is, however, less clear due to uncertainties as to whether the existence of one bought-in service is enough or whether there must be at least two supplies. If the latter option were contemplated, then the issue immediately arises as to what kind of supplies they should be. It is to these issues which I now turn, starting with the latter scenario: if the requirement of multiplicity of services were to be taken at face value, what kind of 'multiplicity' is envisaged?

2. The requirement of multiplicity of services

26. The most recent (re)statement of the requirement of multiplicity of services for the special regime for travel agents to apply, originally touched upon in *Van Ginkel*,[8] came in *Star Coaches*[9] (a). The approach in *Star Coache*s, stressing the requirement of multiplicity of services, can be said to stem from the wording as well as the objectives pursued by that special scheme (b). If that interpretation is embraced, then indeed the distinction between principal and ancillary services, as put forward by the referring court, becomes relevant (c). However, the correct understanding of the requirement of multiplicity of services ought to be tested also against another aspect of the Court's case-law — that which accepts the existence of a service falling within the special scheme for travel agents in the context of a mixed supply, combining only one bought-in service with one in-house service (d).

7 It should be noted, however, that the notion of intermediary, as used in Article 306 of the VAT Directive and its legal predecessors, has not been examined by the Court in any detail. In previous cases touching upon that issue, the Court tasked the national court with verification of whether the condition that the trader was not acting as an intermediary had been met. It would nonetheless appear that the Court effectively made the equation between 'acting in its *own name*' and '*not being an intermediary*' in its judgment of 12 November 1992, *Van Ginkel* (C-163/91, EU:C:1992:435, paragraph 21): 'Article 26(1) of the Sixth Directive makes the application of that article subject to the condition that the travel agent *shall deal with customers in his own name and not as an intermediary*' (Emphasis added). See also judgment of 13 March 2014, *Jetair and BTWE Travel4you* (C-599/12, EU:C:2014:144, paragraphs 54 to 55), and Opinion of Advocate General Poiares Maduro in *ISt* (C-200/04, EU:C:2005:394, point 35). I further note that Articles 44, 50, 54, Article 56(1)(l) and Article 153 of the VAT Directive refer to intermediary or intermediaries '*acting in the name and on behalf of another person*'. It is true that that is not repeated in the second subparagraph of Article 306(1) of the VAT Directive but the opposite (acting 'in its own name') is stated in the first subparagraph of the same provision as a quality pertaining to travel agents.

8 Judgment of 12 November 1992 (C-163/91, EU:C:1992:435).

9 Order of the Court of 1 March 2012 (C-220/11, EU:C:2012:120).

(a) Van Ginkel and Star Coaches

27. In *Star Coaches*,[10] which appears to be the most recent case concerning the requirement of multiplicity of services, the Court did not accept the applicability of the special VAT scheme for travel agents to a trader which was providing (for what is relevant here) bought-in transport services only.[11] That was because the services falling under the special scheme for travel agents cannot be 'reduced to a single service'.[12] The Court explained that 'it cannot …be ruled out that the services of an operator of passenger transport by coach who …has recourse to the transport services of subcontractors liable to VAT may be subject to the special scheme in Article 306 of the VAT Directive'. But for that to occur, such services have to comprise, apart from the transport, other services, such as information and advice relating to a range of holiday offers and the reservation of a coach journey.[13]

28. In reaching that conclusion, the Court relied on its earlier judgment in *Van Ginkel*.[14] However, the facts as well as the statements made by the Court were different and specific to the context in that case. In *Van Ginkel*, the Court held that the fact that the travel agent provides only holiday accommodation does not exclude that service from the special scheme for travel agents.[15] Having reached that conclusion, the Court added that 'the service [of the travel agent] …need not be confined in such a case to a single service, since it may comprise, apart from the letting of the accommodation, services such as information and advice where the travel agent provides a range of holiday offers and the reservation of accommodation'.[16]

29. Thus, in *Van Ginkel* the Court effectively stated that accommodation — one service — is enough. The 'optional extra' in the form of 'information and advice' was stated in the hypothetical. It was not established on the facts of the individual case. It was framed in terms of a possibility ('may'), and was left out of the operative part of the judgment.

30. It would nonetheless appear that the order in *Star Coaches* took that additional remark and turned it into part of the rule, by stating that for the special scheme for travel agents to apply, there must be more than only bought-in accommodation or only bought-in transport provided within the overall supply. Thus, the order in *Star Coaches* appears in fact to require that there be either accommodation or transport and 'something else'. Transport and accommodation do not have to be provided as a combination, but one of those services must be either accommodation or transport because the supply must, as a whole, relate to a journey.[17]

10 Order of the Court of 1 March 2012 (C-220/11, EU:C:2012:120).

11 To be precise, it would appear that the trader was providing both bought-in and in-house transport. But only the former was relevant for the discussion concerning the special scheme for travel agents. The fact that the services were provided to travel agents and not directly to customers was not discussed by the Court as that appeared to be unnecessary.

12 Order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120, paragraphs 22 to 23).

13 Order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120, paragraphs 22 to 23).

14 Judgment of 12 November 1992 (C-163/91, EU:C:1992:435). Judgment of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraph 18).

15 Judgment of 12 November 1992 (C-163/91, EU:C:1992:435, paragraphs 22 to 26).

16 Judgment of 12 November 1992, *Van Ginkel* (C-163/91, EU:C:1992:435, paragraph 24), referring to the judgment of 26 February 1992, *Hacker* (C-280/90, EU:C:1992:92) which concerned the interpretation of the exclusive head of jurisdiction for rights in rem under Article 16 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) (OJ 1978 L 304, p. 36).

17 That was previously stated in the judgment of 9 December 2010, *Minerva Kulturreisen* (C-31/10, EU:C:2010:762). In that judgment, the Court refused to apply the special scheme for travel agents to a trader whose service was limited to selling opera tickets.

(b) Wording and the objectives of the special scheme for travel agents

31. Thus, despite being (arguably) stricter, the approach in *Star Coaches* seems to better reflect the wording of Article 306 of the VAT Directive. That provision refers to the 'supplies of goods or services provided by other taxable persons' used by a travel agent. The idea of plurality of third parties' supplies is also present in Article 307 of the VAT Directive, which creates a legal fiction pursuant to which transactions made by the travel agent in respect of a journey shall be regarded as a single service.

32. That requirement of multiplicity is also echoed in several legislative documents. The *travaux préparatoires* that led to the adoption of the Sixth Directive (that first introduced the special regime for travel agents) are in themselves not entirely informative as to why that special regime was introduced.[18] However, in a proposal of 2002, presenting an amendment that was ultimately not adopted, the Commission stated that the special scheme 'was created due to the specific nature of the profession' and that 'the services provided by travel agents and tour operators most frequently consist of a package of services, in particular transport and accommodation … The application of the normal rules on [the] place of taxation, taxable amount and deduction of input tax would, by reason of the complexity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations'.[19]

33. Thus, the objectives pursued by that special scheme suggest that the simplification sought was primarily tailored to accommodate *substantive* as well as *geographical* multiplicity of services provided, within a single supply, across different Member States.[20]

34. At the level of principle, the Court keeps recalling the idea of geographical and substantive multiplicity in every case that concerns the special scheme for travel agents. The Court indeed finds that services provided by travel agents and tour operators most frequently consist of multiple services, particularly as regards transport and accommodation. It states that the application of the normal rules on the place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties.[21]

18 Report drafted for the Commission, entitled *Study on the review of the VAT Special Scheme for travel agents and options for reform*, Final Report TAXUD/2016/AO-05, December 2017 (accessible on the website of the European Commission), p. 26, point 3.2.

19 Proposal for a Council Directive of 8 February 2002 amending Directive 77/388/EEC as regards the special scheme for travel agents (COM(2002) 64 final) (OJ 2002 C 126E, p. 390). That proposal was later withdrawn, see Withdrawal of obsolete Commission proposals (OJ 2014 C 153, p. 3). See also the Council's interinstitutional file 2002/0041 (CNS), on 'VAT — Special scheme for travel agents' (17567/09).

20 Further, see my Opinion in *Skarpa Travel* (C-422/17, EU:2018:XXX, points 30 to 33).

21 Judgments of 12 November 1992, *Van Ginkel* (C-163/91, EU:C:1992:435, paragraphs 13 to 14); of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraph 18); of 19 June 2003, *First Choice Holidays* (C-149/01, EU:C:2003:358, paragraphs 23 and 24 and the case-law cited); and of 9 December 2010, *Minerva Kulturreisen* (C-31/10, EU:C:2010:762, paragraphs 17 and 18 and the case-law cited); order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120, paragraph 19); judgments of 25 October 2012, *Kozak* (C-557/11, EU:C:2012:672, paragraph 19); of 26 September 2013, *Commission* v *Spain* (C-189/11, EU:C:2013:587, paragraph 58); and of 16 January 2014, *Ibero Tours* (C-300/12, EU:C:2014:8, paragraph 25). Similarly see judgment of 8 February 2018, *Commission* v *Germany* (C-380/16, not published, EU:C:2018:76, paragraphs 41 to 42 and 48).

35. However, beyond the level of those general propositions, it is fair to admit that the content of the exact test is not easy to discern, in particular in view of the *Van Ginkel — Star Coaches* tension. Is one service enough? Which one? If (substantive) multiplicity of services is required, which combinations will qualify? Only accommodation and transport? Or accommodation and something else? Or transport and something else? As correctly noted at the hearing by the German Government, a potential analogy with Directive (EU) 2015/2302 on package travel,[22] which could provide at least some guidance on the definitions,[23] appears to have already been ruled out by the Court.[24]

(c) Principal and ancillary services

36. Were the requirement of multiplicity of services to be considered as a necessary condition for the special scheme for travel agents to apply, then the distinction between principal and ancillary services, pointed out by the referring court, indeed becomes relevant.

37. In the context of the first preliminary question posed, the referring court recalls the distinction made between the principal and ancillary services in the *Ludwig* case.[25] That case concerned the question whether the service provided by a financial adviser, and consisting of negotiation of credit contracts *and* of advice, should be considered as a single supply of negotiation of credit and as such be exempted from VAT under Article 13B(d)(1) of the Sixth Directive.

38. The Court held that 'every supply of a service must normally be regarded as distinct and independent and that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, with the consequence that the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer — envisaged as being a typical consumer — with several distinct principal services or with a single service'.[26] The Court further explained that 'there is in particular a single supply in cases where one or more elements are to be regarded as constituting the *principal* service, whilst one or more elements are to be regarded, by contrast, as *ancillary* services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied'.[27]

39. Although *Ludwig* concerned financial services, it might be recalled that the distinction between principal and ancillary services had been already been considered by the Court in the specific context of the special scheme for travel agents. In *Madgett and Baldwin*,[28] two hotel owners were offering travel packages to customers of their hotel in England. The packages covered accommodation, transport by coach from various pick-up points, and a day trip by coach during their stay at the hotel. The transport services were obtained from third parties. The other services were provided in-house.

22 Directive of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1).

23 Directive 2015/2302 defines 'package' in its Article 3(2) as, in essence, a combination of at least two different types of travel services for the purpose of the same trip or holiday. 'Travel service' is, for its part, defined in Article 3(1) as '(a) carriage of passengers; (b) accommodation which is not intrinsically part of carriage of passengers and is not for residential purposes; (c) rental of cars ….; (d) any other tourist service not intrinsically part of a travel service within the meaning of point (a), (b) or (c)'.

24 See judgments of 11 February 1999, *AFS Intercultural Programs Finland* (C-237/97, EU:C:1999:69), and of 13 October 2005, *ISt* (C-200/04, EU:C:2005:608, paragraphs 30 to 33). See also Opinion of Advocate General Poiares Maduro in *ISt* (C-200/04, EU:C:2005:394, point 33).

25 Judgment of 21 June 2007 (C-453/05, EU:C:2007:369).

26 Judgment of 21 June 2007, *Ludwig* (C-453/05, EU:C:2007:369, paragraph 17). The Court referred to Article 2(1) of the Sixth Directive under which the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to VAT. That provision is now reflected (as regards the supply of services) in Article 2(1)(c) of the VAT Directive.

27 Judgment of 21 June 2007, *Ludwig* (C-453/05, EU:C:2007:369, paragraphs 18 to 19 and the case-law cited).

28 Judgment of 22 October 1998 (C-308/96 and C-94/97, EU:C:1998:496).

The question arose as to whether such packages fell under the special scheme for travel agents. The Court held that they did. That was because the bought-in service could not be considered as merely *ancillary* to the principal one. If that were the case, the overall supply would be considered as falling outside of the special scheme for travel agents.

40. Furthermore, the concept of *ancillary* services in the context of the special scheme for travel agents was also used by the Court post-*Ludwig* in the judgment in *Ist*.[29] That case concerned a trader which offered programmes entitled 'High School' and 'College', which included language courses delivered abroad. The Court examined whether the 'travel' services bought in from third parties by *Ist* remained purely ancillary in relation to the in-house services provided.[30] The Court concluded that it did not. The bought-in travel services 'could not be carried out without a substantial effect on the package price charged, such as travel to the host State and/or the stay in that State'. The bought-in services thus did not represent 'a marginal share in relation to the corresponding services associated with the language training and education'.[31]

41. Thus, the distinction between the principal and ancillary services is far from unfamiliar in the specific area of the special scheme for travel agents. It has been used to ascertain whether the bought-in service (combined with in-house service) falls under the special scheme for travel agents or not. It follows from the judgments in *Madgett and Baldwin* and *Ist* that when the bought-in service constitutes a minor part of the package and does not represent an aim in itself for the customer, it shares the tax treatment of the main in-house service.

42. That being said, the question remains whether the relevance of the distinction between principal and ancillary services should remain limited to the role of an 'external qualifier' of what constitutes the service of a travel agent when there is a mix of in-house and bought-in services provided? Or could it be relevant also as the 'internal verifier' of the composition of the supply, when such a supply is composed of what is alleged to be two bought-in services?

43. To my knowledge, the Court has never dealt with such a scenario. If indeed (substantive) multiplicity of services were to be required, it is difficult to see why such an 'internal test' should be excluded if it were established that one of the bought-in services is actually an ancillary service that has no perceptible bearing on the price of the overall supply, and constitutes merely a means for the customer to better enjoy the principal service. I see no reason to categorically postulate that an artificial splitting of what constitutes one supply in reality could not occur in the field of the special scheme for travel agents.[32]

44. If that logic were to be applied to the present case, then it is fair to state that cleaning (of accommodation) is an ancillary service typically provided with the (short-term rented) accommodation. 'Bread roll' and laundry services may not always be automatically provided. But those services would hardly constitute the aim of the travel on its own; in this sense, they are not indispensable for the traveller to enjoy his accommodation. Of course, there may be exceptional cases in which such an ordinary or common perception would not apply, and those normally ancillary services would have a different status and weight. Examples which might spring to mind could include an exceptional breakfast in the bucolic setting of the Austrian Tyrol, tailored for romantic

29 Judgment of 13 October 2005 (C-200/04, EU:C:2005:608).

30 The packages comprised a return plane ticket from Germany to the United States, accommodation with a host family, food, insurance, study at an American high school or similar institution and educational materials.

31 Judgment of 13 October 2005, *ISt* (C-200/04, EU:C:2005:608, paragraphs 26 to 29).

32 See also judgment of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraphs 41 to 45) that concerned, inter alia, the notion of 'supply of service' and the necessity to look, in some circumstances, beyond the contractual terms and to consider the economic and commercial reality of the transaction to ascertain how a transaction should be classified and whether it constitutes a purely artificial arrangement and abusive practice.

souls, or various types of gastronomic retreats. Or accommodation in a medieval castle with the special offer of 'do-your-own laundry' in historic laundries using traditional methods, and promising the 'genuine feel for the life of a 15th century launderer'. In either scenario, it is likely that such a service would not be merely ancillary to the principal one of accommodation.

45. However, in the present case, it would appear that what was provided locally to the Applicant's customers was one main service, namely accommodation. The cleaning, 'bread roll' and laundry services were indeed merely ancillary services that did not constitute, from the customers' perspective, an aim in itself.

46. Furthermore, it was suggested that the Applicant provided 'information and advice' to the customers (by making information available on the Applicant's website). At the hearing, the respective parties however disagreed as to the implications of this suggestion, namely whether the provision of 'information and advice' was necessary for the supply, as a whole, to fall under the special scheme for travel agents.

47. Even if information and advice were considered to be relevant for that determination (which I consider not to be the case[33]), they are likely to be provided in-house. That brings me to the last necessary point that arises if multiplicity of services were to be required: in several cases, in which the Court considered the applicability of the special scheme for travel agents in the context of a mixed supply, only *one* of those elements was a bought-in service while the other one was provided in-house.[34] I will now turn to those 'mixed situations'.

(d) Mixed supplies

48. It was in the context of 'mixed' supplies that the Court repeatedly insisted on the necessity for the trader to distinguish between bought-in and in-house services,[35] stating that only the bought-in part can be subject to the margin scheme under Article 306 of the VAT Directive.

49. The Court stated that requirement for the first time in *Madgett and Baldwin*, discussed above,[36] and later recalled the same in *Kozak* and *MyTravel*. *Kozak* concerned a travel agency selling all-inclusive packages comprising accommodation and meals, for which Ms Kozak used the services of other suppliers and her own transport. The Court refused the suggestion by the national tax authority that the in-house transport was an essential part of the tourist service as a whole and formed, with a bought-in service, a 'single service' within the meaning of Articles 307 and 308 of the VAT Directive (and therefore should receive the same tax treatment). The Court recalled that only the bought-in service can be subject to Article 306 of the VAT Directive and held that the in-house part of the service cannot.[37] In a similar vein, *MyTravel* concerned a trader selling package holidays that combined bought-in accommodation with in-house transport. The Court specified the method for apportionment between in-house and bought-in services for tax purposes.[38]

33 And I will explain that specific point later. See below, points 55 to 56 of this Opinion.

34 That was the case for judgments of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496) (in-house accommodation with bought-in transport); of 6 October 2005, *MyTravel* (C-291/03, EU:C:2005:591) (bought-in accommodation and in-house transport); and of 25 October 2012, *Kozak* (C-557/11, EU:C:2012:672) (bought-in accommodation and in-house transport). The applicability of the special scheme was refused in *Minerva*, in which there was only one supply considered to be unconnected with travel, namely the sale of opera tickets (judgment of 9 December 2010, *Minerva Kulturreisen* (C-31/10, EU:C:2010:762)). Similarly, the Court refused the applicability of the special scheme in the order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120) (in which only transport was provided).

35 Except if the bought-in service was merely ancillary to the in-house service as stated in judgments of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496), and of 13 October 2005, *ISt* (C-200/04, EU:C:2005:608).

36 Above point 39. In the same judgment, the Court also provided guidance on the method of calculation to be used in this context.

37 Judgment of 25 October 2012 (C-557/11, EU:C:2012:672, paragraphs 23, 25 to 26).

38 Judgment of 6 October 2005 (C-291/03, EU:C:2005:591, paragraph 41).

50. These cases suggest that the *multiplicity of bought-in services* has not actually been required by the Court as a condition for the special scheme for travel agents to apply. At the same time, it is also difficult to infer from those cases that that requirement was satisfied as a result of one bought-in service being mixed with one in-house service. The latter reading appears to be problematic because the in-house service is clearly excluded by the Court from the special scheme for the travel agents. Such a reading would also defy the rule of Article 307 of the VAT Directive under which the supply provided by the travel agent constitutes a single service.

51. In other words, admitting that the in-house/bought-in mix *as a whole* meets the requirement of multiplicity of services, while the in-house element *must be separated* for the purpose of the VAT calculation, would effectively mean that to establish the conditions of the applicability of the special scheme for travel agents, one would use an element of definition (in-house service) that could, however, never *in fine* be subject to that special scheme.

52. At this stage, there is no disguising that if the latest pronouncement of the Court made in *Star Coaches*, requiring the establishment of multiplicity of services, were taken at its full value, the level of complexity in determining what constitutes a service provided by a travel agent falling under the special scheme would be considerable, to say the least (with the exception of the rather clear situation of a travel agent combining bought-in accommodation with bought-in transport). Furthermore, the elements of definition of the required composition of the service(s) in question (accommodation and travel; accommodation or travel and something else), as well as their exact relationship (principal and ancillary services), and their exact 'mixture' in terms of bought-in or in-house 'origin', so far only outlined in terms of options, would need to be made clear.

3. Is one bought-in service (still) enough?

53. There is, however, an alternative approach. It would essentially involve a two-fold judicial statement: a clarification and an update. It would require, first, (re)confirming that the main finding in *Van Ginkel*[39] was not and should not have been called into question by *Star Coaches*.[40] Thus, the rule stated in *Van Ginkel* applies: the provision of one bought-in service is enough for a trader to fall under the special scheme for travel agents. Second, if indeed one bought-in service comprising either accommodation or travel is enough, then it should perhaps also be clarified that the hypothetical passing remark made in *Van Ginkel* concerning the information and advice provided by travel agents is not really a condition, certainly not considering the reality of the travel market in 2018.[41]

54. First, on the level of clarification, as to its factual outcome, such an approach is in line with the previous case-law: *Madgett and Baldwin*, *Kozak* and *MyTravel* seem to confirm the suggestion that 'one bought-in' service is enough provided that it relates to a journey, as stated in *Minerva*.[42] As a result, the special scheme for travel agents applies to a supply of a service which consists in the provision of one bought-in service provided that *the bought-in service is accommodation or transport*. In that situation, whether some other services (bought-in or in-house) are provided in addition is irrelevant. Furthermore, if that is indeed the case, then the distinction between principal and ancillary services becomes irrelevant too.

39 Judgment of 12 November 1992 (C-163/91, EU:C:1992:435).

40 Order of the Court of 1 March 2012 (C-220/11, EU:C:2012:120).

41 'The service [of the travel agent] … need not be confined in such a case to a single service, since it may comprise, … services such as information and advice where the travel agent provides a range of holiday offers and the reservation of accommodation'. Judgment of 12 November 1992, *Van Ginkel* (C-163/91, EU:C:1992:435, paragraph 24), referring to judgment of 26 February 1992, *Hacker* (C-280/90, EU:C:1992:92), which however concerned the interpretation of the exclusive head of jurisdiction for rights *in rem* under Article 16 of the Brussels Convention.

42 Again, the only decision contradicting that line of case-law appears to be *Star Coaches* where the Court insisted that at least two elements be provided.

55. Second, as regards 'information and advice' specifically, as a possible separate service, I already noted that such a 'service' is likely to be in-house. If the applicability of the 'one bought-in service only' rule is made conditional upon such a 'service' being provided, it thus also becomes necessary to separate that in-house part of the package for the purpose of application of the normal rate of taxation.[43] It is not entirely clear to me how such 'information and advice' should be valued (whether based on the actual cost method or the market value approach).[44]

56. Above all, however, I have the difficulty in seeing how the existence (or lack) of any such hypothetical advice of whatever origin should be of any relevance today. The situation was rather different in 1992 when *Van Ginkel* was decided. Not without a touch of nostalgia, it is true that choosing and booking holidays with a travel agent back then might have required the traveller to actually visit a travel agent's bureau; to queue for some time, certainly in the period before the holidays; to get a hard copy of the catalogue; peruse it, discuss travel options with the agent and enquire about further details; and later, perhaps to make several more visits to the travel agency (to pay a deposit; to fill in the appropriate forms; to pick up the plane tickets and/or vouchers, and so on), before finally setting off. In all these stages, the involvement of or advice from the travel agent was crucial. Today, all this can be replaced by several clicks on a smartphone.

57. In sum, should the Court be of the view that the 'one bought-in service is enough' rule is to be applied, I suggest that the applicability of the special scheme for travel agents depends solely on whether bought-in accommodation *or* bought-in transport is provided, with no additional conditions as to what a trader may hypothetically offer in terms of advice on top of that. If, in 1992, the 'information and advice' service was a (never established or proven) hypothesis, in 2018, it is simply unrealistic.

4. The suggested reaffirmation of the 'one bought-in service only' rule

58. There are good textual and systemic arguments for the proposition that there should be the requirement of multiplicity of services for the special scheme under Article 306 of the VAT Directive to apply. Thus, at least two bought-in supplies should be provided by the travel agents.

59. On a textual level, that reading best reflects the wording of the special scheme for travel agents.[45] It also mirrors the specific objectives of that special scheme.[46] Moreover that scheme constitutes an exception to the general rule and the Court has repeatedly stated that it should be 'applied only to the extent necessary to achieve its objective'.[47]

60. It is therefore rather true that in a situation in which the trader supplies only one bought-in service, the objective of simplification that is sought through the special scheme at issue will not necessarily be fully met.

61. However, there are also weighty arguments as to why one bought-in service, provided that it relates to either accommodation or transport and provided, of course, that the travel agent acts in its own name and not just as an intermediary,[48] should suffice for a supply to fall under the special scheme for travel agents.

43 As required by the Court in the case-law discussed above, see points 48 to 51 of this Opinion.

44 See judgments of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraphs 39 to 47), and of 6 October 2005, *MyTravel* (C-291/03, EU:C:2005:591, paragraphs 22 to 41).

45 Above, points 6 to 8 of this Opinion. Article 306 clearly refers to 'supplies of goods or services', using the plural.

46 See above, points 31 to 35 of this Opinion.

47 See judgments of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraphs 5 and 34); of 19 June 2003, *First Choice Holidays* (C-149/01, EU:C:2003:358, paragraph 22); of 9 December 2010, *Minerva Kulturreisen* (C-31/10, EU:C:2010:762, paragraph 16); and of 25 October 2012, *Kozak* (C-557/11, EU:C:2012:672, paragraph 20 and the case-law cited).

48 Above, points 21 to 23.

62. First, looking at judicial practice, with the exception of *Star Coaches*,[49] the Court has never in fact interpreted or applied the special scheme as being limited to supplies composed of at least two bought-in supplies. On the contrary, the Court's approach has been rather generous, interpreting that scheme broadly. That is true not only as regards the *substantive* multiplicity (of services) but also as regards the *geographical* multiplicity. In that respect the Court held that the geographical multiplicity (namely, that the travel agent buys supplies in different Member States) is not an indispensable requirement for the special scheme to apply and that that scheme also applies for services provided within a single Member State.[50] The latter statement was made despite the Court acknowledging, in essence, that the geographical multiplicity was the main *raison d'être* of the scheme.

63. Second, in view of the diversity of services in the travel industry, requiring at least two bought-in supplies for the special scheme to apply would likely exclude from the scope of that scheme those traders who have developed travel businesses based on 'mixed' (bought-in and in-house) supplies. Furthermore, especially if connected with the applicability of the ancillary/principal logic to that assessment, which in cases of requirement of multiplicity could not really be excluded, the definition of what would fall under the special scheme for travel agents would run the risk of being excessively narrow.

64. The counter argument to this second point is the danger of over-inclusion. On a narrow definition, a number of services provided by entities that on any normal understanding of the term are 'travel agents' run the risk of being excluded. Conversely, a broader definition runs the risk of creating a normative overreach. Traders that provide only one travel-related service (such as the Applicant) will fall under that regime, although under *Star Coaches* they would not.

65. That could potentially be true. However, in such a complex legal landscape, it appears advisable to confirm and clarify the solution that has already been in place for several decades, while leaving it naturally to the legislature to opt, should it prove necessary, for a different regime. All in all, it is perhaps fair to admit that, despite the heralded objective of simplification, the implementation of that ideal in the specific context of the special scheme for travel agents remains rather remote from that stated ideal. That particular scheme has become one of the most complex areas of VAT.[51]

66. In the light of the above, my conclusion concerning the first question posed in the present case is that Article 306 of the VAT Directive shall be interpreted as meaning that the special scheme for travel agents applies to a supply of a service which consists in the provision of one bought-in service, provided that that bought-in service is accommodation or transport.

B. Second question: simultaneous application of the margin scheme and reduced rate

67. By its second question, the referring court wishes to ascertain whether the service provided by the Applicant, if classified as falling under the special scheme for travel agents, can be subject to a reduced rate of taxation under Article 98, read in conjunction with Annex III, of the VAT Directive. That question was asked specifically with regard to the accommodation part of the service provided by the Applicant.

49 Order of the Court of 1 March 2012, *Star Coaches* (C-220/11, EU:C:2012:120).

50 Judgment of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraph 19).

51 See the report drafted for the Commission, entitled *Study on the review of the VAT Special Scheme for travel agents and options for reform*, Final Report TAXUD/2016/AO-05, December 2017 (accessible on the website of the European Commission), p. 11.

68. The Applicant suggests an affirmative answer. The German and Netherlands Governments, as well the Commission argue the opposite. They maintain that the application of the reduced rate to the service at issue is precluded by the fact that that travel service is not included in the list in Annex III to the VAT Directive and that application of the reduced rate would go against the logic of simplification of the special scheme at issue. The German Government also recalls, with reference to established case-law,[52] that the scope of application of reduced rates must be interpreted strictly.

69. I share the latter position. A reduced rate of taxation cannot apply once it is established that the service at issue constitutes a travel service.

70. As I recalled in the previous section, under Article 307 of the VAT Directive a service provided by a travel agent constitutes a single service.[53] The logical consequence of that legal fiction is that such a service is different from its respective components.

71. If it is agreed that the special scheme for travel agents applies to one bought-in service related to a journey (accommodation or transport), the provision of that service makes such a supply fall under Article 306 of the VAT Directive which means that it classifies it as a 'travel service'. In other words, once that rule is applied for the purpose of the determination that a given service is a travel service, one cannot then immediately start detaching that label for the purpose of the application of the rate of taxation, while keeping that same label for the purpose of determining the taxable basis.

72. On the systemic level, travel services are not included in Annex III to the VAT Directive (referred to in Article 98 thereof), which lists services subject to a reduced rate, among which, at point 12, is 'accommodation provided in hotels and similar establishment, including the provision of holiday accommodation and the letting of places on camping or caravan sites'.

73. Thus, as the referring court observes, applying the reduced rate of taxation to travel agents as regards the provision of accommodation would conflict with Annex III to the VAT Directive and the objective of simplification pursued by the special scheme for travel agents.

74. The referring court further notes, however, that the refusal to apply the reduced rate of taxation to the accommodation part of the supply at issue may lead to unequal treatment.

75. I admit that the supply consisting in provision of accommodation may, as a result of the 'one bought-in service only' rule receive different tax treatment depending on the way in which that supply is provided (whether it is provided by a travel agent falling under the special scheme or not).

76. However, there are clear limits to such an argument, in particular in the context of VAT and special regimes. If one wished to achieve perfect equality and neutrality in all aspects, one would hardly have special regimes in the first place. Without wishing to sound too formalistic, the formal status of the service provider indeed matters in such situations, even if the economic nature of the service is the same. Thus, VAT law simply treats differently the same services, provided on the one hand by the owner (with or without the help of an intermediary), and, on the other, by a travel agent acting in its own name.[54]

52 Judgment of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 25 and the case-law cited).

53 See above, point 50. See also judgment of 27 October 1992, *Commission* v *Germany* (C-74/91, EU:C:1992:409, paragraph 16).

54 It might be recalled, by analogy, that the Court held that possible distortions of competition resulting from the application of transitory rules concerning the special scheme for travel agents did not authorise the Member States to implement that special scheme incorrectly. See judgment of 27 October 1992, *Commission* v *Germany* (C-74/91, EU:C:1992:409, paragraphs 16 and 26).

77. In the light of the above my conclusion concerning the second question referred is that Article 98 of the VAT Directive, read in combination with Annex III, point (12) to that directive shall be interpreted as meaning that the supply of services that is subject to the special scheme for travel agents under Article 306 et seq. of the same directive cannot be subject to a tax rate reduction for the provision of holiday accommodation.

V. Conclusion

78. In the light of the above, I suggest that the Court respond to the Bundesfinanzhof (Federal Finance Court, Germany), as follows:

(1) Article 306 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax shall be interpreted as meaning that the special scheme for travel agents applies to a supply of a service which consists in the provision of one bought-in service, provided that that bought-in service is accommodation or transport.

2. Article 98 of Directive 2006/112, read in combination with Annex III, point (12) to that directive shall be interpreted as meaning that the supply of services that is subject to the special scheme for travel agents under Article 306 et seq. of the same directive, cannot be subject to a tax rate reduction for the provision of holiday accommodation.